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IN THE

Supreme Court of the United States

October Term, 1966
No. 756

DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee.

JURISDICTIONAL STATEMENT.

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DONALD C. GLOUNER, MURIEL J. GLOUNER, GARY D. GLOUNER, and PATRICIA ANN GLOUNER,

Appellants,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Appellee.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final Order of the District Court of Appeal of the State of California, Second Appellate District, of May 5, 1966, denying Appellants' Petition for an Extraordinary Writ, *i.e.*, a Writ of Certiorari, to review the act of the Superior Court of the State of California for the County of Los Angeles in granting Orders for Possession of Appellants' land to the State of California before service of Summons and Complaint upon Appellants, with neither notice to Appellants nor hearing thereon, and in refusing to vacate such Orders upon motion of Appellants. In the alternative, Appellants' Petition to the District Court of Appeal prayed for a Writ of Mandate commanding the Superior Court of the State of California for the County of Los Angeles to vacate the Orders for Possession or, in the alternative, for such other Extraordinary Writ

as the District Court of Appeal deemed appropriate under the circumstances.

Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of appeal herein, and that a substantial question is presented.

Opinions Below.

The District Court of Appeal for the State of California, Second Appellate District, denied Appellants' Petition for an Extraordinary Writ without a hearing and without opinion [R. 104-105].[1] The Supreme Court of the State of California denied Appellants' Petition for Hearing without opinion [R. 155-156].

Grounds of Jurisdiction.

(i) This is an appeal from the final order of the District Court of Appeal of the State of California, Second Appellate District, denying Appellants' petition for an extraordinary writ seeking to review the order of the Superior Court of the State of California for the County of Los Angeles denying Appellants' motion to vacate order for possession, or in the alternative for a Writ of Mandate directing the Superior Court to vacate the order for possession. See *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8 at page 14.

(ii) The order of the District Court of Appeal of the State of California, Second Appellate District, sought to be reviewed, was entered on May 5, 1966. The notice of appeal to the Supreme Court of the United States

[1]The letter R. followed by numbers, designates pages of the certified record filed herein.

was filed in the Superior Court of the State of California for the County of Los Angeles (the court possessed of the record) on August 1, 1966. Thereafter, pursuant to Rule 13(1) Revised Rules of the Supreme Court of the United States, the time for docketing the case in the United States Supreme Court was enlarged to November 7, 1966, by a judge of the court in which the notice of appeal was filed.

(iii) The jurisdiction of the United States Supreme Court rests on Title 28, United States Code, §1257(2).

(iv) Cases believed to sustain the jurisdiction of the United States Supreme Court are: *Griffin v. Griffin,* 327 U.S. 220; *Mullane v. Central Hanover Bank,* 339 U.S. 306; *City of New York v. New York N.H. and H.R. Co.,* 344 U.S. 293; *Covey v. Sommers,* 351 U.S. 141; *Walker v. Hutchinson City,* 352 U.S. 112; *Schroeder v. City of New York,* 371 U.S. 208; *Wisconsin Electric Power Company v. Milwaukee,* 352 U.S. 948; *Wuchter v. Pizzuti,* 276 U.S. 13; *Armstrong v. Manzo,* 380 U.S. 545; *Pennoyer v. Neff* (U.S.) 5 Otto. 714.

Statute Involved.

Part III, Title VII, §1243.5 of the California Code of Civil Procedure is set forth in Appendix A hereto.

Questions Presented.

The following question is presented by this Appeal:

Is Part III, Title VII, §1243.5 of the California Code of Civil Procedure unconstitutional on its face and as applied in this case, in that it provides that in a condemnation proceeding and before service of summons or other process on local resident land owners,

the trial court must upon condemnor's request issue an *ex parte* Order for Possession purporting to confer upon the condemnor the right to take possession of Defendants' land 20 days after service of such Order (the time of service being entirely at the condemnor's pleasure), thereby taking Appellants' real property — their possessory interest in their land — without service of summons or other process, or any other compliance with the minimal standards of due process of law — notice and hearing?

Statement of the Case.

This appeal arises from an action in eminent domain, in which the State of California seeks to take certain land from the Appellants herein for purposes of freeway construction, and other activities associated therewith.

Appellants are the owners of a parcel of land located in Los Angeles County. They are local residents whose address is and at all times was known to the State of California. The State of California brought an action in the Los Angeles County Superior Court (*People of the State of California acting by and through the Department of Public Works v. Glouner, et al.*, Los Angeles Superior Court Case No. 879171), seeking to take certain parcels of Appellants' land for a freeway construction, for drainage easements, for utility easements to be turned over to private utility companies, and for a temporary construction easement [R. 1-19].

Pursuant to provisions of Part III, Title VII, §1243.5 of the California Code of Civil Procedure, the State, without notice to Appellants and before service of Summons, Complaint or any other process or papers

upon Appellants, secured from the Superior Court of Los Angeles County *ex parte* orders purporting to authorize the State to take possession of the Appellants' land, 20 days after service of such Order on Appellants[2] [R. 24, 26]. Appellants were served with Summons, Complaint and Order for Possession at the same time.

Promptly after being served with such Order, Appellants moved the Superior Court for the State of California, County of Los Angeles, that such Order be vacated [R. 30]. Said motion was expressly based upon a contention of denial of due process of law [R. 30] within the meaning of the Fifth and Fourteenth Amendments of the U.S. Constitution [R. 34-36, 40-41]. The Superior Court denied such motion [R. 44].

Inasmuch as Orders for Possession issued before trial are not appealable in California (*San Francisco Unified School Dist. v. Hong Mow* [1954], 123 Cal. App. 2d 673, 672, 267 P. 2d 27). Appellants, pursuant to the provisions of Part III, Title I, California Code of Civil Procedure, petitioned the District Court of Appeal of the State of California, Second Appellate District, for a Writ of Certiorari, or in the alternative, for a Writ of Mandate, or in the alternative, for such other extraordinary writ as that court deemed appropriate under the circumstances [R. 48], to review the acts of the Superior Court for the County of Los Angeles in issuing such *ex parte* order for possession, or commanding said Superior Court to vacate its order

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[2]The *ex parte* procedure was followed in spite of an admitted lack of urgency: one of the Orders for Possession had an effective date of August 1, 1966, although it was secured on March 11, 1966 [R. 25].

of possession.[3] Appellants' petition for an extraordinary writ was denied without a hearing and without opinion [R. 104-105]. Appellants made no Petition for Rehearing to the District Court of Appeal, as such petition is not permitted after denial of a petition for an extraordinary writ without issuance of an alternative writ or order to show cause (Rule 27[a], California Rules of Court).

Thereupon, Appellants petitioned the Supreme Court of the State of California for a hearing [R. 106]. Such Petition for Hearing was denied without opinion [R. 155-156].

Thereupon, Appellants filed their Notice of Appeal to the United States Supreme Court [R. 157].

In the Superior Court for Los Angeles County [R. 30, 34-35, 40-41], in their petitions to the District Court of Appeal [R. 51-52, 68-71, 77-78] and to the Supreme Court of the State of California [R. 115, 118, 123-125, 126-128], Appellants throughout expressly raised the federal constitutional question, namely, whether the procedure and manner in which Appellants were deprived of their possessory right in their own land without service of process, notice, or hearing was repugnant to the due process requirements, within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.

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[3]In response to such Petition for an Extraordinary Writ there was no appearance by the respondent Superior Court. The Petition was opposed by the real party in interest, the State of California [R. 91], as provided in Part III, Title I, Chapter 4, §1107 California Code of Civil Procedure. There was likewise no appearance by the Respondent Superior Court in the Supreme Court of the State of California.

The Federal Question Raised Is Substantial.

As the construction of interstate highways goes on, aided by federal funds under the Federal Highway Act of 1956, the power of eminent domain strikes increasing numbers of citizens.[4] While the initial links of the interstate highway network were laid out largely across the sparsely populated countryside, currently highways and freeways, with ever-increasing frequency, slash across densely populated areas (see 12 U.C.L.A. Law Review 809). Such impact of highways upon densely populated areas is not confined to the California freeways, but is felt throughout the country (see *e.g.*, Skow, "The 'Highwaymen' Come to Morristown," *Saturday Evening Post*, April 9, 1966, p. 68).

Thus, the instant case brings before this Court, not an isolated incident from Southern California, but a distressing problem which is re-enacted daily throughout the country in literally thousands of cases. This problem gives rise to the issue of what are the due process requirements when a citizen, in a state eminent domain court action, is deprived of possession of his own land before trial.[5] Does due process mandate notice and hearing before the owner's right to possession of his own land is expropriated? Does due process require, at the very minimum, that the owner be served with process, before a court can issue an order depriving him of the possessory interest in his own land?

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[4]Such highways are, of course, only one kind of public works giving rise to the problems involved in this appeal.

[5]Please note that the right to take possession of land prior to trial is not challenged by Appellants. The question raised herein is—what are the *procedural due process* requirements imposed by the United States Constitution on states, when possession of land is so taken.

Appellants respectfully contend that the above two questions should be answered in the affirmative.

This appeal is brought before this Honorable Court upon two lines of cases. First, where, in a judicial proceeding, a court purports to make orders substantially affecting a person's rights, *before any* service upon such person of the court's process, any orders, determinations, and judgments made by such court under the above circumstances are void for failure to comply with the minimum standards of due process. *Pennoyer v. Neff* (U.S.) 5 Otto 714, *Roller v. Holly,* 176 U.S. 398, *Wuchter v. Pizzuti,* 276 U.S. 13, and *Armstrong v. Manzo,* 380 U.S. 545.

The second contention of Appellants is that entirely aside of the question of denial of due process by reason of action by a court lacking jurisdiction over the defendant, substantial rights of a person may not be impaired without notice and a meaningful opportunity to be heard. This point is exemplified by this Court's decisions in *Griffin v. Griffin,* 327 U.S. 220, *Mullane v. Central Hanover Bank,* 339 U.S. 306, *New York v. New York, N.H. & H.R. Co.,* 334 U.S. 239, *Covey v. Sommers,* 351 U.S. 141, and *Armstrong v. Manzo,* 380 U.S. 545.

Specifically, the right to notice and hearing before one's rights are impaired is as applicable to eminent domain proceedings as in any other state action. *Walker v. City of Hutchinson,* 352 U.S. 112, *Wisconsin Electric Power Company v. Milwaukee,* 352 U.S. 948, *Schroeder v. City of New York,* 371 U.S. 208. In the words of this Court:

> "Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a state's power to regulate fishing in its waters (citations), its power to regulate intrastate trucking rates (citations), a city's power to issue certain bonds without a referendum (citation), its power to license motor vehicles (citation), and a host of other governmental activities carried on by the states and their subdivisions . . ." *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 at 192.

The State's exercise of eminent domain is but one kind of state action which, in all its manifestations, is fully subject to the constitutional limitation of due process of law imposed on the states by the Fourteenth Amendment (*Southern R. Co. v. Virginia*, 290 U.S. 190; *Mooney v. Holohan*, 294 U.S. 103, *N.A.A.C.P. v. Alabama*, 357 U.S. 449).

The power to take possession of land being condemned prior to trial is peculiarly susceptible to abuses by a condemnor. Even under Federal statutes, where the trial court has full power to permit possession only upon such terms and at such time as it deems just (see 40 U.S.C. §258a), the power of immediate possession can be used by condemnors as a club over the head of the property owner (see *United States v. 6,576.27 Acres, etc.*, 77 Fed. Supp. 244, 247). Moreover, under Federal law, even where the government claims urgent and compelling reasons for early possession, the property owner is entitled to notice, hearing, and appellate review of the circumstances of such taking of possession (See *United States v. Certain Land in Borough of Manhattan*, 332 F. 2d 679, 682).

But, in California, under the statute challenged herein, no such safeguards exist. California courts acting under the challenged statute, lack the power to prescribe conditions precedent to the taking of immediate possession by the State, or create *any* requirements safeguarding the property owners' rights.

California Code of Civil Procedure §1243.5 in mandatory language (". . . the court shall . . .") requires the court to grant possession at such time as requested by the condemnor, subject only to the requirement that the Order of Possession be served 20 days before possession.

The only discretion which Code of Civil Procedure §1243.5 purports to grant to California trial courts is as to the amount of money to be deposited as security prior to the taking. But it is manifest, that even that power is illusory as far as any real protection to the property owner is concerned. When the application for an Order for Possession is made to a California court *ex parte,* before the property owner is even served with process, the trial court has no facts before it except those which the condemnor chooses to place before the court. There is no semblance of adversary proceeding, the adverse party is not even within the jurisdiction of the court. It is respectfully submitted that even the best-intentioned court under such circumstances is reduced to the status of the condemnor's "rubber stamp". The court under these circumstances cannot know the facts, nor the equities, nor the values involved, nor any undue hardships which the immediate possession may impose on the property owner. And if it did know them, it—unlike a Federal Court under 40 U.S.C. §258a—could do nothing about them. Each

case has its own problems for the owner, which a court proceeding *ex parte* is necessarily ignorant of. Under California law trial courts lack the power to delay possession, or impose any conditions upon the condemnor, and the taking of possession is not subject to appellate review.

In conclusion, Appellants respectfully submit that, manifestly, under the California procedure described above, substantial Federal rights of citizens to notice and hearing, the *sine qua non* of due process of law, and their right, likewise protected by due process of law, to be brought within the jurisdiction of a court which purports to expropriate their rights, are being disregarded. Such procedure opens the door wide to grave abuses. Abuses, it has been held, are not to be tolerated, whether present or potential (*Southern R. Co. v. Virginia, supra,* 290 U.S. at 195, *United States v. 6,576.27 Acres, etc., supra,* 77 Fed. Supp. at 247, *Hornsby v. Allen,* 326 F. 2d 605 at 610).

The procedure outlined by the statute challenged herein deprives courts of their traditional role as guardians of the constitutional rights of litigants, reduces the courts to servants of condemnors, and makes a citizen's rights in the courts a matter of governmental grace or discretion. Such state of affairs is repugnant to the concept of the due process of law. *Roller v. Holly,* 177 U.S. 398 at 409; *Coe v. Armor Fertilizer Works,* 237 U.S. 413 at 424-425; *Security Trust v. Lexington,* 203 U.S. 323 at 333; *Louisville and Nashville R. Co. v. Central Stockyards Co.,* 212 U.S. 132 at 144.

To permit such procedure to go unchecked will undoubtedly insure continuing abuses on the part of state condemning agencies. It is therefore respectfully sub-

mitted that the federal question presented here is indeed substantial.

Moreover, in view of California's peculiar procedure which denies the right to appeal an Order for Possession issued before trial, relief by this Honorable Court is urgently needed, as a matter of plain justice as well as constitutional principle.

In the end, no state agency can possibly be prejudiced or its effective functioning impaired by the requirement that it afford to the citizens the safeguards inherent in due process of law ". . . a profound attitude of fairness between man and man, and more particularly between an individual and government . . .". The honor and effectiveness of the sovereign, whether state or nation, can only be enhanced and not diminished by granting to its citizens a full measure of the protection guaranteed by the U.S. Constitution.

Appellants respectfully urge that this Honorable Court hear this appeal and thereupon reverse the order of the District Court of Appeal of the State of California appealed from, and declare Part III, Title VII, §1243.5 of the California Code of Civil Procedure to be repugnant to the United States Constitution.

Respectfully submitted,

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JERROLD A. FADEM,
GIDEON KANNER,
Counsel for Appellants.

APPENDIX A.

Part III, Title VII, § 1243.5, California Code of Civil Procedure.

(a) *Security for payment of compensation; amount; deposit; application for court order.* In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) *Authority to take immediate possession of and to use property; contents of court order.* If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) *Personal service or mailing of court order; record owners or owners of the property defined.* At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered

or certified mail in lieu of personal service. the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) *Increase or decrease in security.* At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the

security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) *Security as evidence in trial of issue of compensation.* The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) *Right of appeal.* The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

APPENDIX B.

Exhibit 1.

Order of Superior Court of the State of California for the County of Los Angeles, Denying Motion to Vacate Order for Possession [R. 44].

Superior Court of the State of California for the County of Los Angeles. Dept. 64.

Date: April 26, 1966.

Honorable James D. Tante, Judge. Deputy Sheriff, O. Ortiz, Deputy Clerk. James J. Marquardt, Reporter. (Parties and counsel checked if present)

9:00 am. 879771.

Counsel for Plaintiff. Pegram & Montoya by: Robert W. Vidor.

Counsel for Defendant. Fadem, Brown & Kanner for defts. Glouner by: Gideon Kanner.

The People of the State of California, etc. vs. Donald C. Glouner, et al.

(Parcels 1A, 1B, 1C, 1D, 1E, 1F & 1G).

Nature of Proceedings: Eminent Domain.

Motion of defendants, Glouner, to vacate the Order for Possession.

Matter comes on for hearing.

Following argument, defendants' motion to vacate the Order for Possession is denied. Notice waived.

Exhibit 2.

Order of District Court of Appeal of the State of California, Second Appellate District, Denying Petition for Extraordinary Writ. [R. 104-105]. (This Is the Order Appealed From.)

MINUTES OF DIVISION FOUR

Civil No. 30572. May 5, 1966.

Glouner vs. Superior Court L.A. Co.

The Court: Petition for writ of Certiorari or mandate denied.

Exhibit 3.

Order of the Supreme Court of the State of California, Denying Petition for Hearing.

Order Denying Hearing After Judgment by District Court of Appeal. 2nd District, Division 4, Civ. No. 30572. Order Due, June 3, 1966.

In the Supreme Court of the State of California in Bank.

Glouner, et al. v. Superior Court of Los Angeles County.

Filed, June 1, 1966.

Petition for hearing Denied.

Traynor
Chief Justice.